REMARKS

Claims 1-7 are currently pending in this application and claims 8-51 are herewith canceled without prejudice or disclaimer as to the subject matter thereof.

I. Claim Rejections Under 35 U.S.C. §102

Claim 1 stands rejected under 35 U.S.C. §102 (b) as being anticipated by U.S. Pat. No. 6,070,100 to Bakels et al. (Bakels) and as also being anticipated by U.S. Pat. No. 6,129,744 to Boute (Boute).

Applicant herein amends claim 1 to include at least one limitation not present in either Bakels or Boute thereby negating this ground of rejection.

Applicant respectfully suggests that neither Bakels or Boute alone include a limitation regarding measuring the QRS of only a last-to-depolarize chamber in the situation wherein the patient's ventricles are not contracting in a synchronized manner. Since neither reference contains limitation either expressly or by principles of inherency, this ground of rejection ought to be withdrawn.

II. Claim Rejections Under 35 U.S.C. §103

Claims 1-7 stand rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Pat. No. 5,902,324 to Thompson et al. (Thompson) in view of U.S. Pat. No. 5,749,906 to Kieval et al. (Kieval).

In connection with combining references to support an assertion of obviousness, it is well established that the Examiner bears the burden of establishing a prima facie case of obviousness. In re Oetiker, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992). In doing so, the Examiner must determine whether the prior art provides a "teaching or suggestion to one of ordinary skill in the art to make the changes that would produce" the claimed invention. In re Chu, 36 USPQ2d 1089, 1094 (Fed. Cir. 1995). A prima facie case of obviousness is established only when this burden is met.

The burden is still on the Examiner even when the Examiner relies upon a single reference. "Even when obviousness is based on a single prior art reference, there must

be a showing of a suggestion or motivation to modify the teachings of that reference." In re Kotzab, 55 USPQ2d 1313, 1316-17 (Fed. Cir. 2000).

In the case of In r Lee, 61 USPQ2d 1430 (Fed. Cir. 2002), the Federal Circuit stated: "This factual question of motivation is material to patentability, and [can] not be resolved on subjective belief and unknown authority." Id. at 1434. Determination of patentability must be based on evidence, id. at 1434, and the Examiner provided none: no references pertaining to aggregation or averaging were cited, no official notice was taken, no evidence of any kind was presented. The Examiner's failure to present an evidentiary basis for the decision is clearly a legal error. Id. Assertions such as "common knowledge and common sense," even if assumed to derive from the Examiner's expertise, are not evidence, and conclusory statements do not fulfill the Examiner's obligation to make an evidentiary record. Id. at 1434-35; In re Dembiczak, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999).

If indeed the elements were known in the art, then the Examiner ought to present evidence to support that conclusion. In re Lee, 61 USPQ2d at 1435 ("[W]hen they rely on what they assert to be general knowledge to negate patentability, that knowledge must be articulated and placed on the record."). The failure to do so renders the Examiner's rejection arbitrary, capricious and unreasonable. See id. at 1434. The Examiner may not arbitrarily, capriciously and unreasonably deny a claim by a mere declaration of obviousness without a supporting evidentiary record.

Applicant respectfully suggests that neither Thompson or Kieval include any limitation regarding measuring the QRS of only a last-to-depolarize chamber in the situation wherein the patient's ventricles are not contracting in a synchronized manner. Furthermore, neither Thompson nor Kieval contain any suggestion or motivation to drive one of skill in the art to include such a limitation. Since the references fail to teach all limitations of the presently claimed invention, the Examiner has failed to present a *prima facie* obviousness rejection and as such, the claimed subject matter should be deemed allowable over the art of record.

Accordingly, Applicant respectfully asserts that the subject covered by claims 1-7 represents pat ntable subject matter and hereby requests the Examiner to issue a

Notice of Allowance in du course so that the claimed invention may pass to timely issuance as U.S. Letters Patent.

The Examiner is invited to contact the undersigned regarding this application.

Respectfully submitted,

Date: 15 March 2004

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